IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 972 OF 2001.

1. Smt.Bitte @ Arabunissa Abdul Gaffar,
2. Baby Hajra Banu Abdul Gaffar,
3. Baby abira Babu Abdul Gaffar,
   Appellants Nos.2 and 3 minors, through
   Appellant No.1 mother, r/o. Masjid
   Galli, Dongra, Kalina, Santacruz
   East, Mumbai 400 029. ... Appellants.

Versus.

1. Mohd.Hasan Mehdi Hasan Khan,
   Kurla East, Mumbai 400 024.

2. New India Assurance Co.Ltd.,
   87, Mahatma Gandhi Road,
   Flora Fountain, Mumbai-23. ... Respondents.

Shri M.B.Kotak for the Appellants.

None for the Respondents.

CORAM : ABHAY S.OKA, J.

DATED : 15th January, 2007.

ORAL JUDGMENT.:

1. Heard Shri Kotak for the Appellants. None appears for the Respondents. The challenge in this Appeal is to the Judgment and order dated 11th May 2001 passed by the learned Commissioner for Workmen's Compensation and the Judge of the Labour Court, Mumbai. By the impugned Judgment and Order, the learned trial Judge has dismissed the claim application filed by the Appellants. However, the learned Judge saddled the Respondent No.1 with costs of Rs.5000/-. The impugned

Judgment and order shows that no evidence was led on behalf of the Appellants.

2. Shri Kotak appearing on behalf of the Appellants has invited my attention to the Roznama of the proceedings. He submitted that due to the compelling reasons the Appellants could not remain present before the learned Commissioner. He stated that though on 3rd April 2001 the learned Commissioner granted time to lead evidence, none of the Appellants could remain present to lead evidence. He submitted that if an opportunity is made available to the Appellants, they will certainly lead evidence. He submitted that so far as the liability of the Insurance Company is concerned, now issue has been settled by a decision of the Apex Court in the case of National Insurance Co.Ltd. v/s. Prembai Patel and others (2005 ACJ page 1323). He submitted that the Apex Court has interpreted a policy providing for "Act liability only". He, therefore, submitted that the Insurance Company is certainly liable to pay compensation. None appears for the Respondents. The Respondent No.2 is represented by an Advocate. Though the Appeal was kept back for sometime, none appeared for the 2nd Respondent.

3. I have considered the submissions of Shri Kotak. From the Roznama it does appear that the Appellants were

absent on a number of dates. On 15th February 1999, 3rd April 1999, and 19th April 1999, the Roznama discloses that both the parties were present. On 15th May 1999, the Appellants were not present. On 12th August 1999 and 25th September 1999 both the parties were absent. On 6th December 1999 the Advocate for the Appellants was present. However, none appeared for the Respondents. On 29th January 2000, certain documents were produced by the Appellants. From 18th March 2000 to 11th December 2000, on various dates both the parties were absent. On 22nd January 2001 and 14th February 2001, both the parties were present. On 3rd April 2001 adjournment was sought by the Respondents for filing the written statement. On that date last chance was granted to the Appellants to adduce oral evidence on 10th April 2001. On 10th April 2001, the Roznama discloses that both the parties were present and an application for adjournment was made at Exh.U-8 on behalf of the Appellants which was rejected. On that day the Claim Application was adjourned to 17th April 2001 and thereafter to 8th May 2001 for the evidence of the 2nd Respondent. On 8th May 2001, the evidence of the 2nd Respondent was recorded and on 11th May 2001 the application was dismissed.

4. The Appellant No.1 is the widow of the deceased Abdul Gaffar who allegedly died due to the accident which took place during the course of his employment on

24th February 1998. The Appellants Nos.2 and 3 are minors. The burden to prove that the deceased was in the employment of the 1st Respondent and that the accident took place during the course and out of the employment was on the Appellants. It is true that the Appellants have not led evidence though opportunity was granted to them. Shri Kotak pointed out that the Appellants could not stay in Mumbai after the death of the deceased and they are required to shift to their native place and that is the reason why they were absent. Considering the fact that the husband of the 1st Appellant has lost his life, in my view, in the interests of justice one more opportunity deserves to be granted the Appellants to appear before the trial Court and to lead evidence. So far as the liability of the 2nd Respondent is concerned, the learned Commissioner for Workmen's Compensation is bound to take into consideration the law laid down by the Apex Court in the case of National Insurance Co. (supra). It must be noted here that after remand, the Appellants are expected to promptly attend to the proceedings before the learned Commissioner and they should not seek any adjournment unnecessarily.

5. Hence the following order is passed:

i) The impugned Judgment and Award dated 11th May

2001 is quashed and set aside. The Application (WCA) No.594/B-119 of 1998 is restored to file.

ii) The Applicants are directed to appear before the learned Commissioner for Workmen's Compensation on 12th March 2007 at 11.00 a.m. After receiving the writ of this order, the learned Commissioner will issue notice of the date fixed to both the Respondents.

iii) The Appellants are permitted to lead evidence before the learned Commissioner. The 2nd Respondent will be entitled to lead further evidence, if necessary, in addition to the evidence which is already adduced.

iv) The Claim Application shall be decided by the learned Commissioner on its own merits as expeditiously as possible and preferably on or before 31st December 2007.

v) All contentions on merits are kept open.

vi) The Appeal is partly allowed in the above terms with no order as to costs.

vii) Writ to be sent down immediately.

Judge.